TO WHAT EXTENT SHOULD INSANE PERSONS BE AMENABLE TO CRIMINAL LAW?

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Of all the theological concepts which, after misleading mankind for centuries, are in our day being relegated to the lumber-room of the obsolete, none has been more potent in influencing the thinkings and doings of men than the notion of a physical hell, ruled by a personified principle of evil.

I call this a theological concept, for that the devil is not once mentioned by name in the Old Testament, and there are in it no passages which can be tortured into an affirmation of his existence, except through those strained interpretations, in the art of which the theologians are such adepts. As we read history, whether sacred or profane, we wonder whether it is not they, the zealous friends of religion, who are, after all, its worst enemies? There is a pathetic passage in one of the minor prophets, which is usually taken as a prophecy of Christ, and if so, may fairly be construed as a forecast of the way in which He would be treated in His Church: "And one shall say, what are these wounds in thine hands? And He shall answer these are the wounds with which I was wounded in the house of my friends." The conceit of a personal devil luring men to his terrible domain for their eternal misery is the foundation of much of the theology which has been grafted upon His gospel. It is but natural that it should have been the basis of a system of penology, which was formed and developed under its influence. Starting thus, what could be more logical than the proposition that the insane man is an unfortunate being who is possessed of a demon acting under the command of the Prince of Darkness, and who is forced by this demon to say and do things from which he would shrink in horror if he were in his right mind? What more reasonable than the deduction that an insane man can not have any intent? But without intent to do evil, how can one be guilty of crime? Hence the sapient conclusion of the law, that if a person upon trial of an

indictment for crime is found to have been insane at the time of the commission of the act, he must be acquitted.

The state, having thus provided this avenue of escape, the lawyers and the doctors have been astute to devise a plan by which evildoers could travel over it. The theory of temporary insanity, its latest development being called brainstorm, was invented. All the odd things or foolish things which the accused has done in his lifetime—and who can truly say that he has always spoken or acted wisely?—are gathered together and framed into an hypothetical question by some shrewd mind skilled in the art of perversion. Then experts are sought, who, in consideration of so much cash, are willing to testify that, in their opinion, the person who said or did such things was insane. The amount of cash to the expert is in inverse ratio to the amount of insanity in the offender. It is a remarkable instance of Providence tempering the wind to the shorn lamb, that the poor do not seem to be subject to brainstorms. Their insanity is of a kind which costs little to prove. The brainstorm brand is only for the rich. It is so devilish in its cleverness that it goes far to upset the proposition that there is no such person as the devil. As legal fictions have been invented by lawyers, so the doctors have created a medical fiction to enable wealthy criminals to cheat the law. There is now living a certain rich man, who in early life committed a murder, escaped the penalty of his crime by aid of a medical fiction of insanity and afterward disproved the truth of his expert's opinion by a successful career in two distinct lines of professional endeavor.

There is now living another, who was guilty of a foul and cowardly murder in a public resort, who was acquitted on the ground of insanity, was sent to an insane asylum, and at this moment is planning for his release by reason of a regained sanity. It would indeed be a sad fate for an unfortunate prodigal son, who while possessed of the devil, had been so unlucky as to kill some hated person, to lose his life as a forfeit, or be incarcerated in an insane asylum. The brainstorm theory is equal to the necessities of the case. Evidence of past insanity frees the accused from jail, and evidence of present sanity frees him from the asylum.

It is an instance where in avoiding Scylla one need not fall on Charybdis. Another advantage for the brainstorm theory is, that the same experts can be used twice, making it a little cheaper than it

would be if a new set were required on the habeas corpus proceedings. I take it that it is thoroughly understood in every community how the plot is worked. Where there is an acquittal on the ground of insanity, the prisoner must be committed to an insane asylum. But he must have been sane enough to be tried, otherwise his trial would have had to be postponed. Now, if he were insane at the time of the offense and had become sane enough to be tried, it is evident that his insanity was temporary in its nature. Storms, whether of wind or brain, are usually temporary. An innocent man, who is sane, has a right to his freedom. The acquittal by the jury on whatever ground is conclusive evidence of his innocence. Where a man is detained in any place against his will, he has a right to a writ of habeas corpus, under which the person detaining him must produce him in court and show what authority there is for the detention. There are but three kinds of legal detention known to our law, one under a commitment for trial, a second by virtue of a sentence by a court of justice, the other through a committal as insane. A prisoner under sentence has no right to a writ of habeas corpus, except to inquire into the jurisdiction of the court to impose the sentence. Thus it follows that when an accused is acquitted on the plea of insanity and is committed to an asylum, he can get out of the latter, provided he can produce evidence that he has become sane. The brainstorm theory is the dodge that enables him to do it with the same set of experts. The astute counsel of a thrifty murderer would bargain with the experts for both jobs in advance. The conversation would run somewhat in this tenor, though perhaps not quite so bald in words: "Dr. Blank, here are all the odd and queer doings and sayings of this misguided man, with which I have been furnished by himself or sympathetic relatives. I am informed that they can be sustained by proof. Please whip them up into an hypothetical question and then inform me on the following points, (1) what would your answer on the witness stand be to that hypothetical question; (2) in case the prisoner should be acquitted on the ground of insanity, would your answer preclude you from testifying as to his regained sanity; (3) what will be your total charge for your three answers; namely, your answer to me now, your repetition of it at his trial, and your answer the other way on subsequent habeas corpus proceedings?" How many doctors

can resist such a temptation as that? A negative opinion means no cash, or very little, an affirmative, thousands of dollars.

Now suppose that by a simple enactment the law is changed so that the jury instead of finding a verdict of "not guilty by reason of insanity," return "guilty, but insane." Then suppose that it is further enacted that whenever upon the trial of a person accused of a crime the verdict is returned, "guilty, but insane," such person shall be sentenced to serve the same term in an insane asylum as he would have to serve in jail, but for the finding of insanity; and in cases where death is the penalty for an offense by a sane man, imprisonment for life to be the term for the insane criminal.

It is obvious that much scandal in the administration of criminal justice would be plucked up by the roots. The question therefore arises whether in the proper development of our system of penology, the defense of insanity should not be abolished.

It is in such a forum as this that such a question should be thoroughly discussed. It is no light thing to overturn the precedents of centuries. In doing away with the scandals which I have mentioned, we should proceed carefully, thoughtfully and with deliberation, should weigh every consideration for and against. In any attempt to bring criminals within the grasp of the law, we should be mindful not to do injustice to the innocent. Thus we are brought face to face with the question, is a man who has done a deed of violence innocent because he is insane? To answer that question rightly, we must answer many others. Some of them I shall attempt to do.

First, what is the basis for the right of the state to inflict the penalty of death for the infraction of a law of the state? In the times when the Church had an authority, which science has in our day so greatly shaken, it was sufficient to quote the words of Holy Writ, "Whoso sheddeth man's blood, by man shall his blood be shed." We are beginning to see that this was more by way of prophecy than command.

It is not supposed that argument is necessary in support of the proposition, that the only ground for the right of society to punish the individual for an evil deed is its own protection. Those of us, who still hold to a theology unchanged by modern science, need but to be reminded that the Divine Teacher laid down the principle, "Judge not that ye be not judged." It is only the Supreme Searcher

of Hearts who can impartially judge and justly sentence evil doing by reason of an inferred evil intent. Society cannot do it. The problems as to motives lie too far below the surface to be reached by any human plummet. On the other hand, those of us, who accept the teachings of modern science and have revised our theological dogmas in its light, or perhaps thrown them overboard altogether, will endorse the proposition as an axiom.

Now, if the right of society to punish is based on and measured by its right to protect itself, the solution of the problem in hand is not far to seek. The insane man is just as dangerous to the community as the sane. In fact, he is more so, for the sane man is to some extent open to the restraints of law, or at least of prudence. The insane man is believed to be under no such restraint, although it might be noted that experience at the insane asylums would seem to show that the insane man is restrained by fear of punishment, as well as the sane. We bind over to keep the peace and can imprison, if need be, the sane man who threatens violence, which he may never do. We acquit as innocent an insane man, who has actually done a deed of violence. Was ever a more horrible mockery? The man who has already demonstrated that he is a menace to society is, on the opinion of an expert that he is not likely to misbehave again, allowed to go free. Whereas, a man whose violent words have never actually ripened into deeds can be laid by the heels.

Second, What is insanity?

Is it true that the insane man is possessed of a demon, who controls him against his will? We need not spend time on this. We may content ourselves with quoting the latest definition of insanity as found in the Century Dictionary, "a seriously impaired condition of the mental functions, involving the intellect, emotions or will, or one or more of these faculties, exclusive of temporary states produced by and accompanying acute intoxications or acute febrile diseases."

To my mind that is a very unsatisfactory definition. I would define it as that state of a man's intellectual faculties, when he chooses the wrong major premise, as the reason for his conduct. Common sense is the ability to select on the instant the right major premise as the basis for action. Insanity is simply the absence of common

sense. The doctors are entirely right, in my humble judgment, when they say that all men are more or less insane.

In this discussion, we are concerned only with that form of insanity which results in acts, against which society must protect itself.

Third, What are the reasons which are urged against the abolition of the defense of insanity?

I can think of only two, (*a*) the suggestion that it would be unconstitutional, (*b*) pity for the unfortunate and his family. Let us examine each.

There is absolutely nothing in the objection that it would be unconstitutional to do away with the defense of insanity as an answer to an accusation for crime. The insane man has no constitutional right to kill. The insane man is not known to the constitution. He gets his defense by an enactment of the legislature, and the power which gives can take away. Take for example the law of New York. Its statute passed about ninety years ago—a re-enactment of the common law it must be admitted—provides, "No act done by a person in a state of insanity may be punished as an offense, and no insane person can be tried, sentenced to any punishment, or punished for any crime or offense, while he continues in that state." That is still the law, phrased in its penal code, more verbosely, but in effect the same (Section 20). It could be constitutionally replaced by a section equally short and pithy: "Insanity or other mental deficiency shall no longer be a defense against a charge of crime; nor shall it prevent a trial of the accused unless his mental condition is such as to satisfy the court upon its own inquiry that he is unable, by reason thereof, to make proper preparation for his defense." Provide, that if at the time the jury renders the verdict the court has reason to believe that at the time of the commission of the crime the prisoner was insane or afflicted with any mental deficiency, it may then defer sentence and cause an inquiry to be made, and if, as the result of that inquiry the prisoner is found to have been sane, the court shall then sentencee him to be hanged, or electrocuted or imprisoned in a jail, as the case requires; and if insane, the court shall then sentence him to be confined in the proper state asylum during his life or for a term of years, as the case requires.

The objection of pity for the unfortunate and his family can-

not be so readily answered. Over the door of sentiment too often is found the superscription, "He who enters here must leave all reason behind." Pity for the family is indeed a negligible thing, for there is no difference in the quality of the stigma placed on a man's family between a verdict, "Not guilty by reason of insanity" and one, "Guilty, but insane."

The feeling of pity for the unfortunate himself, who, when not in his right mind has done a deed, from which in possession of his faculties, he would shrink with horror, ought not as a matter of cold reason, to prevent such a change of the law. The protection of society is much more important than pity for the individual. Sympathy for his misfortune can take the direction of alleviating his condition while in a place of confinement. If once it is generally understood that this is a question which should be decided by reason, and not by sentiment, the battle in favor of the change will be all but won.

Lastly, I am not advocating anything new. It has been the law of England for years, that in cases of insane persons juries may render the verdict "Guilty, but insane." As we inherited from England the defense of insanity, we will do well to follow her example by its abolishment.

As the English Act is short it may be interesting to give it in full. It is Chapter 38, of the laws of 1883.

"SECTION 1: This Act may be cited as the Trial of Lunatics Act, 1883.

"SEC. 2. (1) Where in any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence, that he was insane, so as not to be responsible according to law for his actions at the time when the act was done or omission made, then if it appears to the jury before whom such person is tried that he did the act or made the omission charged, but was insane as aforesaid, at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane, as aforesaid, at the time when he did the act or made the omission.

"(2) Where such special verdict is found, the Court shall order the accused to be kept in custody as a criminal lunatic in such place and in such manner as the Court shall direct until her Majesty's

pleasure shall be known; and it shall be lawful for her Majesty thereupon, and from time to time to give such order for the safe custody of the said person during pleasure in such place and in such manner as to her Majesty may seem fit." See also the Criminal Lunatics' Act, 1884 (chap. 64).

In order to follow this precedent in this country we should need in each state an act couched along the following lines:

First: Repealing the statute which provides that insanity shall be a defense to an indictment for crime; and, secondly, providing in its place the following:

If upon the trial of any person accused of any offence it appears to the jury upon evidence that such person did the act charged, but was at the time insane, so as not to be responsible for his actions, the jury shall return a special verdict, "guilty, but insane," and thereupon the court shall sentence such person to confinement in a state asylum for the criminal insane for such term as he would have had to serve in prison, but for the finding of insanity. And, if upon the expiration of such term it shall appear to the court that such person is still insane, his confinement in such asylum shall continue during his insanity. And further, when such a verdict of "guilty, but insane" is returned in a case where the penalty for the verdict of guilty against a sane person is death, such sentence for the insane person thus found guilty shall be for life.

It is supposed that the pardoning power vested in a Governor or Pardoning Board would apply to such an insane criminal, but if not, then in deference to sentimental considerations it might be well to provide that the Governor or Pardoning Board shall have special power to pardon an insane criminal thus confined.